

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 14th day of September, two thousand seven.

PRESENT:

HON. DENNIS JACOBS,
Chief Judge,
HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
Circuit Judges.

MOHAMMAD JASMIN AL SAYAR,
Petitioners,

v.

06-4045-ag
NAC

PAUL D. CLEMENT,¹ UNITED STATES
ATTORNEY GENERAL,
Respondent.

FOR PETITIONERS: Mark A. Goldstein, Goldstein &
Associates, LLC, Pittsburgh, PA.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Paul D. Clement is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

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2 **FOR RESPONDENT:** Peter D. Keisler, Assistant Attorney
3 General, Civil Division, Aviva L.
4 Poczter, Senior Litigation Counsel,
5 Rosanne M. Perry, Trial Attorney,
6 Office of Immigration Litigation,
7 Civil Division, U.S. Department of
8 Justice, Washington, D.C.
9

10 UPON DUE CONSIDERATION of this petition for review of a
11 Board of Immigration Appeals ("BIA") decision, it is hereby
12 ORDERED, ADJUDGED, AND DECREED that the petition for review
13 is DENIED.

14 Petitioners Mohammad Jasmin Al Sayar, a native and
15 citizen of Kuwait, and his wife Irina Smirnova, a native and
16 citizen of Russia, seek review of a July 31, 2006 order of
17 the BIA affirming the February 28, 2005 decision of
18 Immigration Judge ("IJ") Brigitte Laforest, denying their
19 application for asylum, withholding of removal, and relief
20 under the Convention Against Torture ("CAT"). In re
21 Mohammad Jasim Al Sayar, Irna Smirnova, Nos. A96 273 957,
22 A95 430 668 (B.I.A. July 31, 2006), aff'g Nos. A96 273 957,
23 A95 430 668 (Immig. Ct. N.Y. City Feb. 28, 2005). We assume
24 the parties' familiarity with the underlying facts and
25 procedural history in this case.

26 When the BIA adopts and supplements the IJ's decision,
27 this Court reviews the decision of the IJ as supplemented by
28 the BIA. See *Yu Yin Yang v. Gonzales*, 431 F.3d 84, 85 (2d
29 Cir. 2005). However, when the BIA affirms the IJ's decision

1 in all respects but one, this Court reviews the IJ's
2 decision as modified by the BIA's decision. *Xue Hong Yang*
3 *v. U.S. Dep't of Justice*, 426 F.3d 520, 522 (2d Cir. 2005).
4 Here, the BIA found it unnecessary to address the IJ's
5 adverse credibility determination and instead rested its
6 decision on petitioners' failure to meet their burden of
7 proof. Thus, we will review the IJ's decision as
8 supplemented by the BIA, but will not address the IJ's
9 adverse credibility determination. See *Yu Yin Yang*, 431
10 F.3d at 85; *Xue Hong Yang*, 426 F.3d at 522.

11 This Court reviews the agency's factual findings under
12 the substantial evidence standard, treating them as
13 "conclusive unless any reasonable adjudicator would be
14 compelled to conclude to the contrary." 8 U.S.C.
15 § 1252(b)(4)(B); see, e.g., *Zhou Yun Zhang v. INS*, 386 F.3d
16 66, 73 n.7 (2d Cir. 2004), overruled in part on other
17 grounds by *Shi Liang Lin v. U.S. Dep't of Justice*,
18 —F.3d—, Nos. 02-4611, 02-4629, 03-40837, 2007 WL 2032066 (2d
19 Cir. July 16, 2007) (en banc). However, we will vacate and
20 remand for new findings if the agency's reasoning or its
21 fact-finding process was sufficiently flawed. *Cao He Lin v.*
22 *U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir. 2005).

23 Here, the agency's determination that Al-Sayar failed
24 to meet his burden of proving a well-founded fear of future

1 persecution is supported by substantial evidence. Both the
2 2003 U.S. Department of State Country Report on Human Rights
3 Practices for Kuwait (the "Country Report") and the 2003
4 International Religious Freedom Report for Kuwait (the
5 "Religious Freedom Report") suggest that Kuwaitis who
6 convert from Islam to other religions are subject to
7 harassment and discrimination. However, "mere harassment"
8 does not rise to the level of persecution. Ivanishvili v.
9 U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006).
10 Without more, the statements in the Country Report and the
11 Religious Freedom Report are insufficient to prove that the
12 treatment of Muslim converts in Kuwait exceeds the level of
13 "mere harassment" and amounts to persecution. Id.

14 Al-Sayar submitted various reports and treatises
15 discussing Islamic law that classify apostasy, i.e, the
16 renunciation of Islam through conversion, as a crime
17 punishable by death. However, Al-Sayar did not establish
18 that the Kuwaiti courts follow Islamic law or impose death
19 or other penalties on known converts from Islam. Muslims in
20 Kuwait do have recourse to independent religious courts that
21 apply Shari'a in family law cases. Nonetheless, according
22 to both the Country Report and the Religious Freedom Report,
23 the primary legal system in Kuwait is secular, not Islamic,
24 and the Kuwaiti Constitution provides for freedom of
25 religion. See Tu Lin v. Gonzales, 446 F.3d 395, 400 (2d

1 Cir. 2006) (holding that State Department reports are
2 probative of asylum applicants' claims).

3 Al-Sayar's withholding and CAT claims ultimately rest
4 on the same factual predicate as his asylum claim, i.e.,
5 that he will be labeled an apostate and subjected to
6 mistreatment in Kuwait because he converted from Islam to
7 Buddhism. Because Al-Sayar was unable to show the objective
8 likelihood of persecution needed to make out an asylum
9 claim, he was necessarily unable to meet the higher standard
10 required to succeed on a claim for withholding of removal.

11 See Paul v. Gonzales, 444 F.3d 148, 156 (2d Cir. 2006).

12 Likewise, given that Al-Sayar could not meet the burden of
13 proof for either asylum or withholding of removal, it stands
14 to reason that he could not establish that it was more
15 likely than not that he would be tortured upon return to
16 Kuwait. See severally Kyaw Zwar Tun v. INS, 445 F.3d 554,
17 566-67 (2d Cir. 2006). Thus, the agency did not err in
18 denying Al-Sayar's withholding and CAT claims.

19 On a final note, Al-Sayar's argument that the IJ was
20 biased against him, thus denying him his due process rights,
21 is meritless. In considering a petitioner's claims, an IJ
22 may neither make an arbitrary determination nor deny the
23 petitioner a "full and fair opportunity to present [his]
24 claims.'" Li Hua Lin v. U.S. Dep't of Justice, 453 F.3d 99,

1 104-05 (2d Cir. 2006)(quoting Xiao Ji Chen v. U.S. Dep't of
2 Justice, 434 F.3d 144, 155 (2d Cir. 2006). A review of the
3 record reveals that Al-Sayar received ample opportunity to
4 testify, submit corroborating evidence, present witness
5 testimony and be represented by counsel. There is no
6 evidence in the record that the hearing at issue to indicate
7 that it was not "full and fair."

8 For the foregoing reasons, the petition for review is
9 DENIED.

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11 FOR THE COURT:
12 Catherine O'Hagan Wolfe, Clerk

13 By: _____
14 Oliva M. George, Deputy Clerk
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